IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4497 of 1991
with
Civil Application No.3047 of 1994.

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE STATE OF JUJARAT & 2 - Petitioner(s)
Versus
MUKESH KUMAR S . BHOI - Respondent(s)

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Appearance :
MR LB DABHI ld. AGP for Petitioner(s) : 1 - 3.
MR PR NANAVATI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 10/08/2006

ORAL JUDGMENT

1. Heard the learned AGP, Mr.Dabhi, appearing on behalf of petitioners and learned Advocate,

Mr.Nanavati, appearing on behalf of respondent.

2. In this petition, petitioner has challenged two orders; one is ex-parte award passed in Reference No.316 of 1986 dated 3.6.1989 wherein Labour Court has granted reinstatement with continuity of service with full back wages for interim period. This being an ex-parte award, the petitioner has filed Misc. Application No.14 of 1990 with a prayer to set aside the ex-parte award before the Labour Court, Godhara. Said application has been rejected by Labour Court, Godhara.

3. Learned AGP, Mr.Dabhi, submitted that respondent workman, who was working with Executive Engineer tribal area, Deval Division, Dahod, has been closed in the year 1986. The workman was remained in service upto 1985. He raised industrial dispute in the year 1986. The Labour court, Godhara has decided the matter in absence of petitioner. He submitted that application for setting aside ex-parte award was

filed by another department and not the same department against whom ex-parte award was passed by labour court, Godhara. Therefore, Labour Court has rejected the application on the ground that applicant was not a party before the Labour Court in Reference. Learned AGP, Mr.Dabhi, submitted that respondent workman was appointed for a period of 29 days and after completion of 29 days service, fresh order has been issued in favour of respondent workman, so he was not remained in continuous service with the petitioner and his service was having the break for a period of one or two days in each month. Therefore, he had not completed 240 days continuous service within the meaning of Section 25B of the I.D.Act,1947. Therefore, according to him, provision of Section 25F of the I.D.Act,1947 is not applicable to the facts of this case. He also submitted that he was a daily wager working with the petitioner department tribal area and not entitled any amount of back wages for interim period. He also submitted that Labour Court has

not discussed the question of back wages while granting the full back wages in favour of respondent workman. He also submitted that workman has not deposed before the Labour Court that he remained unemployed during the interim period. Therefore, according to him, when workman has not deposed before the Labour Court about his unemployment, then, it is not the burden upon the employer to prove gainful employment of the workman. He submitted that Labour Court remain silent about this aspect and not discussed at all in the award itself that on what basis and on what ground the Labour Court is granting full back wages of interim period. He also submitted that this Court has passed an order in CA No.1368 of 1993 dated 23.7.1993 wherein benefit of wages from the date of award has been calculated by the petitioner which comes to Rs.1,09,933.30 paise upto the date of order dated 23.7.1993 which has been deposited by the petitioner before this Court and that amount is lying with the Registry of this Court. The order passed by this Court in

CA no.1368 of 1993 dated 23.7.1993 is quoted as under :

> “As per the Computation made by the respondent an amount of Rs.1,09,933.30 ps. (Rupees One Lakh Nine thousand thirty and paise thirty only) becomes payable to the petitioner workman. In the facts of the case respondent is directed to deposit the aforesaid amount with the office of this Court on or before August 9, 1993. After the amount is deposited, the request of the learned Counsel for the respondent to place the main matter for final hearing will be considered. The respondent shall also explain as to why the direction given by the Labour Court as regards reinstatement of the workman has not been complied with so far. It will be open to the workman to verify the computation made by the respondent and submit his objection to the same, if any.”

3.1 Therefore, he submitted that the order passed in Misc. Application is required to be set aside and at the most, according to him, looking to the

evidence on record, workman is not entitled to any relief from the Labour Court and, therefore, Labour court has committed gross error in granting the relief in favour of respondent workman.

4. Learned Advocate, Mr.P.R.Nanavati, submitted that the petitioner is not able to point out any details that as to why the petitioner remained absent when notice of the Court has been served to the petitioner. Copy of statement of claim also received by the petitioner and after the amendment in the statement of claim, the amended copy of statement of claim was also served by hand delivery to the petitioner. He also submitted that written submission was filed vide Exh.7 by the petitioner before the Labour court but, no averment has been made about closure of the department concerned. Therefore, the Labour Court was right in granting the relief in favour of workman. He also submitted that once the termination order is set aside violating Section

25F of the I.D.Act,1947, then, workman is entitled ordinarily full back wages of interim period and exception is to be proved by petitioner. Therefore, according to him, the Labour Court has rightly granted the amount of back wages for interim period. He also submitted that Labour Court has not committed any error which requires interference by this Court.

6. Looking to the ex-parte award, statement of claim was filed by the workman before the Labour Court vide Exh.4. The dispute of termination referred for adjudication on 15.4.1986. The statement of claim was amended vide Exh.11 which was served to the petitioner by hand delivery. The workman remained in service for the period from 18.2.1982 to 16.2.1985. He was working as a Typist Clerk but, according to him, no regular salary was paid to him which amounts to unfair labour practice adopted by the petitioner. The amended statement of claim was served by hand delivery but no one remained present before the

Labour Court on behalf of petitioner. The workman has filed affidavit vide Exh.21. The service of the workman was orally terminated by Executive Engineer. No notice or inquiry was initiated against the workman. No retrenchment compensation or notice pay or notice were served to the respondent. It is not the case of petitioner that Section 25F of the I.D.Act has been complied. Therefore, the Labour Court has considered that in spite of the notice served by the Court as well as receiving the amended statement of claim by hand delivery, petitioner has not taken care to remain present before the Labour Court, therefore, the Labour Court has passed an award in absence of petitioner. On behalf of workman, affidavit was filed about the hand delivery service to the petitioner. Therefore, Labour Court has granted the relief while setting aside termination order. Before the labour court in Misc. Application which has been filed by different department raising the contention that present applicant was not a party

in the reference proceedings. Therefore, naturally, the normal reaction of the Labour Court is that if present applicant was not a party to the reference, then, present applicant should not have to file such application before the Labour Court. Therefore, why the petitioner remained absent and what was the compelling ground and circumstances available to the petitioner to remain absent which are not come on record as application was rejected only on technical ground. Before the Labour Court, application was given by the workman to produce the record but, no record was produced by the petitioner. Along with the petition, the petitioner has produced certain orders of appointment from page-12 onwards. Application of workman dated 17.2.1982 and order was issued on 18.2.1982 for a period of 29 days. Second order page-13, application dated 17.2.1982 and order was issued on 22.3.1982 for a period of 29 days. Third order at page-14, application dated 1.7.1982 and order is dated 5.7.1982 for a period

of 29 days. Fourth order at page-15, application of the workman is dated 9.6.1982 and order dated 29.9.1982. 5th order at page-16 application of workman 30.12.1982 and order is dated 3.12.1982. In all, these are the orders were produced by petitioner before this Court. Except that, no other order has been produced by the petitioner. In view of these facts, from 1st order at page-12 application is dated 17.2.1982 and order 18.2.1982 to mean that workman was appointed by 29 days order from February,1982 and remained in service according to order which are annexed to the petition upto January, 1983. Thereafter, no order has been produced. But before the Labour Court according to workman, he was remained with petitioner for the period from 18.2.1982 to 16.2.1985. In the written statement which was filed by petitioner before the Labour Court, according to petitioner, the workman was remained in service from 1.12.1982 to 30.6.1983 as mentioned in Para.3 of the award. After perusing the entire record, how incorrect details have

been given by the petitioner being a statutory authority before this Court. On one hand, the petitioner has annexed 5 orders w.e.f. 17.2.1982 and in written statement, it is mentioned that w.e.f. 1.12.1982 to 30.6.1983 the workman was working with the petitioner. Though there is difference in written statement filed before the Labour Court and order produced before this Court and averments made in the petition wherein it is made clear that workman remained in service w.e.f. 18.2.1982 to 18.3.1985. If during this period of one year, if the working days is calculated, he completed 240 days continuous service. Apart from that, ignoring the averments made in the petition, if it is considered the averments made in the written statement, then also, w.e.f. 18.2.1982 to 30.6.1983, workman had completed 240 days. So at both the way, it is proved before this Court that workman remained in service for a period of 240 days continuously and at the time of terminating his service, Section 25F has not been followed by petitioner. The

defence of periodical appointment is not applicable to the facts of this case because Section 2(oo)(bb) of the I.D.Act,1947 came into force w.e.f. 18.8.1984. It is a case of prior to amendment of Section 2(oo)(bb) of the I.D.Act,1947. The Section (bb) of Section 2(oo) not having any retrospective effect (See: Bharat Heavy Electricals Ltd. v. R.V.Krishnarao, reported in 1989 (2) GLH 1). It is also necessary to note that periodical appointment order has been issued subsequent to the continuance of the workman in service. Not exactly on the date on which the application was submitted by the workman. So during this interim period, workman was remained in service when periodical order passed by the petitioner subsequently. The petitioner has issued such periodical orders with a view to deny and deprive the legal right of respondent, so respondent cannot get the protection under Section 25 F of the I.D.Act. Such practice without any justification is bad and hit by Article 14 of the

Constitution of India (See : Manager (P&A) Oil and Natural Gas Corporation Ltd., Chennai v. G. Radhakrishnan, reported in 2005 III LLJ 324 (MAD, DB). Therefore, respondent workman is entitled the benefit under Section 25F of the I.D.Act,1947 which has not been complied with. Therefore, the Labour Court has rightly set aside the termination order and granted the benefit of continuous service to the respondent workman.

7. Now, I am examining the question of back wages of interim period which has been granted by labour Court, Godhara. There is no evidence on record of the workman that he remained unemployed. The burden is upon the workman to prove unemployment as laid down by the Apex Court in case of Municipal Council, Sujanpur v. Surinder Kumar, reported in 2006 (5) Scale 505. Relevant Para.13, 15 and 16 which are quoted as under:

“13. Equally well settled is the

principle that the burden of proof having regard to the principles analogus to Section 106 of the Evidence Act that he was not gainfully employed, was on the work [see Manager, Reserve Bank of India, Bangalore v. S. Mani & Ors., (2005) 5 SCC 100].

14. XXX

15. Apart from the aforementioned error of law, in our considered opinion, the Labour Court and consequently the High Court completely misdirected themselves insofar as considering that relief to be granted in terms of section 11A of the said Act being discretionary in nature, a Labour Court was required to consider the facts of each case therefor. Only because relief by way of reinstatement with full back wages would be lawful, it would not mean that the same would be granted automatically.

16. For the said purpose, the nature of

> the appointment, the purpose for which such appointment had been made, the duration/tenure of work, the question whether the post was a sanctioned one, being relevant facts, must be taken into consideration."

8. In view of the aforesaid decision of the Apex Court, the workman has not proved unemployment and, therefore, there is no burden upon the petitioner to prove gainful employment. The Labour Court has committed gross error in not discussing this issue separately that as to why and on what basis, the Labour Court has granted back wages of interim period. There is no discussion in award. This being an unreasoned order without application of mind, granting the relief of back wages which requires to be set aside while confirming the order of reinstatement with continuity of service. Accordingly, present petition is partly allowed, setting aside the direction of granting full back wages of interim

period from the date of termination till the date of ex-parte award while confirming the granting of relief of reinstatement with continuity of service. Rule is made absolute to that extent.

9. When this Court has confirmed the reinstatement with continuity of service, naturally the workman is entitled the benefit of regular wages as there is no stay granted by this Court against the award in question. Accordingly, this Court has granted the relief in favour of respondent workman in CA No.1368 of 1993 dated 23.7.1993. This Court has granted regular wages from date of award till 23.7.1993 which comes to Rs.1,09,933.30 paise. Therefore, it is directed to the Registry to issue account payee cheque in the name of MUKESHKUMAR S. BHOI of Rs.1,09,933.30 paise with accrued interest, if any, after proper verification and identification will be made by learned Advocate, Mr.Nanavati. It is further directed to the petitioner to pay regular wages to the respondent workman from

23.7.1993 till date of actual reinstatement within a period of 2 months from the date of receiving the copy of this order.

10. As per the order passed by this Court on 26.7.2006, the respondent workman is reinstated by the petitioner and he is working with the petitioner. In view of the above, Civil Application No.3047 of 1994 is disposed of.

(H.K.RATHOD,J.)

(vipul)